Cause No. 13-19-00486-CV

IN THE THIRTEENTH COURT OF APPEALS OF TEXAS
CORPUS CHRISTI-EDINBURG

MSW CORPUS CHRISTI LANDFILL, LTD.
Appellant/Cross Appellee

VS.

GULLEY-HURST L.L.C.
Appellee/Cross-Appellant

APPEAL FROM THE DISTRICT COURT, 117th JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

GULLEY-HURST L.L.C.'S APPELLEE RESPONSE BRIEF

John D. Bell
State Bar No. 02078900
jdbell@wbwpc.com
WOOD, BOYKIN & WOLTER,
A Professional Corporation
615 North Upper Broadway, Suite 1100
Corpus Christi, Texas 78401
(361) 888-9201
(361) 888-8353 (facsimile)

Douglas A. Allison
State Bar No. 01083500
doug@dallisonlaw.com
LAW OFFICES OF DOUGLAS A. ALLISON
403 North Tancahua Street
Corpus Christi, Texas 78401
(361) 888-6002; (361) 888-6651 (fax)

Douglas Laycock
State Bar No. 12065300
dlaycock@law.utexas.edu
University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
Telephone: 512-232-1224

ATTORNEYS FOR APPELLEE
GULLEY-HURST L.L.C.

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Appellant/Cross-Appellee:

Parties:
MSW Corpus Christi Landfill, Ltd.

Counsel:
Audrey Mullert Vicknair
State Bar No. 14650500
Law Office of Audrey Mullert Vicknair
802 N. Carancahua, Suite 2100
Corpus Christi, Texas 78401-0038
Telephone: (361) 884-5400
Telecopier: (361) 884-5401 fax
avicknair@vicknairlaw.com

Patrick J. Carew
State Bar No. 24031919
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201
Telephone: (214) 922-7100
Telecopier: (214) 279-5178
Email:
pcarew@kilpatricktownsend.com

THE MARYE LAW FIRM, P.C.
Monica I. Bohuslav
State Bar No. 24074250
2619 Hibernia Street
Dallas, Texas 75204
Telephone: (214) 987-8240
Telecopier: (214) 987-8241
mbohuslave@maryelaw.com

Appellee/Cross-Appellant:

Parties:
Gulley-Hurst L.L.C.

Counsel:
John D. Bell
State Bar No. 02078900
WOOD, BOYKIN & WOLTER,
A Professional Corporation
615 N. Upper Broadway, Suite 1100
Corpus Christi, Texas 78401
Telephone: (361) 888-9201
Facsimile: (361) 888-8353
jdbell@wbwpc.com

Douglas A. Allison
State Bar No. 01083500
Law Office of Douglas A. Allison
403 North Tancahua Street
Corpus Christi, Texas 78401
Telephone: (361) 888-6002
Facsimile: (361) 888-6551
doug@dallisonlaw.com

Douglas Laycock
Alice McKean Young Regents Chair in Law Emeritus
University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
Telephone: 512-232-1224
State Bar No. 12065300
dlaycock@law.utexas.edu

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

The crux of the issues in this business dispute relate to a Mutual Release & Settlement Agreement (the "MSA") executed in 2015 by two joint owners of a landfill to resolve prior litigation filed in 2013. The MSA was reached through a mediation with the participation of the principals involved represented by counsel. The MSA is a complete instrument and does not require parol evidence to indicate what the parties intended, thought or desired to be the operative terms.

As the trial court determined, and this Court of Appeals should affirm, the MSA speaks for itself. In Section 1, MSW Corpus Christi Landfill, Ltd. ("MSW") is granted the right to buy-out an undivided one-half interest in a landfill from Gulley-Hurst L.L.C. ("Gulley-Hurst"). Section 2 describes what is required to transpire if that right is not exercised: (1) MSW "shall provide clear title by special warranty deed" to its one-half interest in the landfill to Gulley-Hurst, (2) Gulley-Hurst is required to write off a $3,500,000 seller note that it held from MSW, and (3) Gulley-Hurst is required to refinance certain existing indebtedness of MSW at AmeriState Bank and get personal guaranties released within 120 days.

Nothing in Section 2 of the MSA provides for any type of option. MSW cannot somehow twist its obligation to "provide clear title by special warranty deed" to Gulley-Hurst into not being required actually to convey title.

MSW argues that the jury implicitly made findings of facts that never were

presented to the jury and would be contrary to the expressed provisions of the documents. The sole liability questions by the jury were that Gulley-Hurst failed "to arrange for the refinancing of the AmeriState Bank Loan as required by the MSA" and additionally failed "to arrange for the release of personal guaranties as required by the MSA." The jury did not find that Gulley-Hurst failed to purchase the Landfill or that MSW still owned one-half of the Landfill. It also is undisputed that MSW never had to make any payments on the loan and the jury returned a verdict of $0 in damages for lost credit. MSW has not appealed that finding.

This case additionally involves novel claims for damages not previously accepted by any court. No question exists that the standard measure of damages of a seller when a buyer defaults is the difference between the contract price and the market value of the property. The relationship of those amounts, however, cannot be "flipped" in order to create a positive value. If the failure to arrange for refinancing instead was a failure to purchase (which it was not), the spurned seller could not claim damages because the property it owned was worth *substantially more* than the contract price.

The trial court correctly granted a judgment n.o.v. on the jury's finding that MSW suffered damages equal to the value of the property that exceeded the contract price. A seller only suffers damages if the value of the property is less than the contract price.

The MSA's provisions were clear as to what would happen if a party failed to perform as required. MSW had the right to purchase the property on or prior to September 24, 2015, and absent that, Gulley-Hurst was obligated to arrange for the refinancing and release of the personal guaranties 120 days later by January 22, 2016. The trial date had been reset to February 1, 2016, and had there been a failure of consideration or rescission of the MSA, the parties would have gone to trial. Instead, the parties passed the trial date and allowed the prior lawsuit to be dismissed for want of prosecution.

Additionally, MSW did not ever seek specific performance to require that the refinancing be completed. Instead, MSW filed a Notice of Lis Pendens against the property preventing the completion of any refinancing by Gulley-Hurst. MSW seeks to recover damages based on models that would place it in a position far <u>better</u> than would exist if Gulley-Hurst had fully performed under the MSA.

MSW makes other claims that somehow the MSA really created an option in Section 2, that it did not actually convey title by the delivery of a special warranty deed, that the MSA should be rescinded, and that Gulley-Hurst breached some unknown duty to disclose facts that caused MSW not to do something that it never established it had the capability of doing. None of these claims have any basis in law or in fact.

MSW's appeal should fail on each of these issues.

ISSUES PRESENTED

Issues Raised by Appellant

1. The trial court improvidently rendered judgment notwithstanding the verdict and disregarded the jury's award of $10.235 Million to MSW. The parties jointly owned a Landfill with a total market value of $35,470,000 ($17,735,000 each). Pursuant to an agreement between the parties, GH was to purchase MSW's one-half interest for $7.5 Million. GH failed to purchase MSW's half, but there is no dispute GH retained control of the asset. GH does not contest the jury's findings that it failed to purchase MSW's one-half. MSW was deprived of its ability to sell its interest to a third party. The evidence supports the jury's finding and the law supports MSW's recovery of the difference between the price to be paid by GH to purchase MSW's one-half interest and the market value of the Landfill at the time of the breach, minus any indebtedness owed on the Landfill by MSW: $10.235 Million.

2. In the alternative, the case should be remanded for a determination of MSW's lost profits. The trial court erred by refusing to submit MSW's lost profits question (CR 3186). GH has retained control of the Landfill since (as the jury found) GH failed to purchase MSW's one-half. Because liability is not contested, a remand for damages only is proper. MSW should have been permitted, and must now be permitted, discovery of Landfill financial information post-2015 and full presentation at trial.

3. Failing both of the above, this was an option contract with which the jury has implicitly found GH failed to comply. The trial court refused to submit MSW's option contract questions (CR 3182-83). The damages for option contract are identical to those for breach. MSW's damages should be reinstated, otherwise they should be remanded for trial.

4. MSW did Not Convey Its Interest to GH; the Court Could Not Grant Summary Judgment on Counts 1, 12 and 13.

5. If damages are not reinstated or remanded, the trial court improvidently rejected MSW's claim for rescission. If MSW does not recover the difference in contract price/market value, does not recover lost profits, and is not entitled to option contract damages, it will not be adequately compensated for GH's breach. Rescission would be the only available remedy.

6. MSW's additional claims and remedies related to GH's failure to purchase should be resurrected: Counts 6-10, 11 (regarding GH's mishandling of MSW's deed), and 2-5 (underlying operating agreement).

7. MSW's fraud claim, arising from misrepresentations made during MSW's 120-day purchase period, should be remanded. The trial court's no-duty determination is contrary to the law and the evidence; abundant fact issues existed. Summary judgment could not have been granted.

Cross-Point Raised by Appellee

1. The trial court correctly rendered judgment notwithstanding the verdict and disregarded the jury's award of $10.235 Million to MSW. The relationship between the contract price and market value cannot be "flipped" in order to create damages when the market value actually is higher than the contract price.

STATEMENT OF FACTS

On September 23, 2011, Gulley-Hurst conveyed to MSW an undivided one-half interest in a Type IV landfill located at 1435 County Road 26, Corpus Christi, Texas 78415 (the "Landfill"). CR V1, P.71. Gulley-Hurst retained the remaining undivided one-half interest in the Landfill. *Id.*

The sales price was $7,500,000.00, which was 100% financed and comprised of $4,000,000 advanced by AmeriState Bank on behalf of MSW and a $3,500,000 Promissory Note (the "$3,500,000 Note") in seller-financing executed by MSW payable to Gulley-Hurst. *Id.;* RR V25, DX 38 (emails with attached promissory note).

In addition to the $4,000,000 paid to Gulley-Hurst, MSW borrowed $1,000,000 from AmeriState Bank for working capital to commence operations at

the Landfill. *Id*. The advance of both amounts was evidenced by a $5,000,000 Promissory Note (the "$5,000,000 Note") executed by MSW and payable to AmeriState Bank. *Id.*; RR V25, DX37. The $5,000,000 Note was secured by a first lien on 100% of the real property comprising the Landfill. Thus, MSW's debt burdened both the one-half interest owned by MSW and the one-half interest owned by Gulley-Hurst. *Id.* Additionally, Thomas Noons ("Noons"), Shane Shoulders ("Shoulders") and Raymond Sanders ("Sanders"), the principals of MSW, personally guaranteed the $5,000,000 Note. *Id.*; RR V25, DX 34-36.

On September 23, 2011, Gulley-Hurst and MSW also entered into a Landfill Operating Agreement providing for the operation of the Landfill by MSW under the Municipal Solid Waste Permit 2349, which already had been issued to Gulley-Hurst, for operation of the Landfill. CR V1, P.71-72; RR V24, PX 60A. The Agreement provided that MSW would operate the Landfill and pay Gulley-Hurst a monthly amount equal to fifty percent (50%) of the "Net Operating Income" (as such term is defined in the Agreement) from all operations of the Landfill during the preceding month. *Id.*

A year later, MSW borrowed an additional $200,000 from AmeriState Bank (the "$200,000 Note") for additional operating capital. CR V1, P.687; RR V20, P.210. Both the $5,000,000 Note and the $200,000 Note were secured by a second lien on 100% of the Landfill. CR, V1, P.687.

Following various disputes, a lawsuit was filed by Gulley-Hurst against MSW on August 13, 2013, as Cause No. 2013CCV-61449-2 in County Court at Law No. 2 in Nueces County, Texas (the "Prior Lawsuit"). The Prior Lawsuit concerned MSW's operation of the Landfill, its use of the operating capital obtained from AmeriState Bank under the $5,000,000 Note, its failure to pay Gulley-Hurst its 50% of the net operating income, and its non-payment of the $3,500,000 Note. CR V1, P.387. MSW made various counter-claims against Gulley-Hurst in the same proceeding. *Id.*

On May 27, 2015, the parties compromised and settled all matters in controversy in the Prior Lawsuit by the MSA after mediation with Marvin Nebrat. *Id.* Section 1 of the MSA granted MSW the right to purchase Gulley-Hurst's one-half interest in the Landfill within 120 days. RR V24, PX 48. Under Section 2 of the MSA, if MSW failed to exercise its right to buy out Gulley-Hurst, MSW was required to convey its one-half interest in the Landfill to Gulley-Hurst. At the same time, Gulley-Hurst was required to write off the $3,500,000 Note that MSW owed to Gulley-Hurst and then refinance the existing loans of MSW to AmeriState Bank within 120 days. *Id*. The term "option" does not appear anywhere in Section 2 of the MSA, and that paragraph is set forth below *verbatim* for reference:

> 2. Sale by MSW. In the event that MSW fails to close the purchase of the one-half interest owned by GH as provided above, MSW agrees to sell its undivided one-half interest to GH for $7,500,000 on the following terms: GH shall refinance the approximately $4,800,000 balance owed to AmeriState

> Bank by MSW and eliminate all personal guaranties and obligations of MSW and its guarantors for such loan and write off the remaining balance of the $3,500,000 seller-financed note for such one-half interest for the remaining amount of the consideration. In such event, 120 days after the execution of this Agreement MSW shall provide clear title to GH by special warranty deed to its one-half interest subject only to those conditions of title accepted in the purchase of its one-half of the Landfill in September 2011, the liens in favor of AmeriState Bank securing the $5,000,000 loan, the liens securing the $200,000 loan originally in favor of AmeriState Bank, and any liens created or permitted by GH in its operation of the Landfill since August 2013. GH shall arrange for the refinancing of the AmeriState Bank loan and release of guaranties within 120 days after the expiration of the period provided in Section 1 above. Any title insurance required or other closing costs in connection with such refinancing shall be the expense of the GH.
>
> RR V24, PX 48

Nothing in the text of Section 2 creates any type of option contract in favor of Gulley-Hurst or in any way conditions delivery of any instruments by MSW. Gulley-Hurst was required immediately to write off the $3,500,000 Note that MSW owed it for the seller financing, then arrange for refinancing the AmeriState $5,000,000 Note and obtain release of the personal guaranties within 120 days. *Id.* Under Section 4 of the MSA, the Prior Lawsuit would remain pending until completion of the sale either under Section 1 or Section 2, and the MSA was enforceable as an agreement of the parties under Rule 11 of the Texas Rules of Civil Procedure. *Id.*

MSW did not purchase Gulley-Hurst's interest in the Landfill within the 120 days as provided in the MSA on or prior to September 24, 2015. CR V1, P.387. On September 24, 2015, counsel for Gulley-Hurst communicated with counsel for MSW

about the logistics for obtaining a deed (the Deed") and a transfer (the "Transfer") conveying all of MSW's undivided one-half interest in the Landfill and the related personal property, accounts and other assets to Gulley-Hurst in exchange for the cancelled $3,500,000 Note. CR V1, P.430.

On September 29, 2015, counsel for MSW and Gulley-Hurst agreed to a simultaneous exchange by FEDEX in which MSW would send the Deed and Transfer at the same time Gulley-Hurst would send the $3,500,000 Note. CR V1, P.428. The only condition expressed regarding the exchange was that the $3,500,000 Note would not be marked "PAID IN FULL" until Gulley-Hurst's counsel confirmed receipt of the Deed and Transfer. *Id.* and CR V1, P.436. On September 30, 2015, Gulley-Hurst's counsel received the Deed and Transfer and sent an email confirming its receipt to MSW's counsel. CR V1, P.440. The $3,500,000 Note also was confirmed as delivered to MSW's counsel. CR V1, P.428 and P.442.

Gulley-Hurst filed the Deed and Transfer of record with the Nueces County Clerk on October 2, 2015. RR, V24, PX53 & 54. Additionally, Gulley-Hurst wrote off the balance of the $3,500,000 Note as required in Section 2 of the MSA. CR V1, P.387.

No evidence whatsoever exists concerning any agreement to hold the Deed and Transfer in trust, in escrow or as a bailment. No evidence whatsoever exists

concerning any conditional delivery of the Deed and Transfer by MSW's legal counsel. The sole evidence of such arrangements were the never previously-communicated understandings of Noons expressed at trial three and a half years later. 17 RR P.12.

Gulley-Hurst negotiated with AmeriState Bank for refinancing the approximately $4,800,000 balance owing on the $5,000,000 Note and elimination of all personal guaranties for the loan. CR V1, P.387-388. Gulley-Hurst executed all of the financing documents required by AmeriState Bank and returned the same to the Bank on or about February 11, 2016, two weeks after the 120-day deadline. *Id.* Noons refused to execute the Assignment and Assumption of Indebtedness document required by the Bank on behalf of MSW, so the assumption of the $5,000,000 Note and release of the personal guaranties was not completed. CR V1, P.388.

Since assuming operation of the Landfill in August, 2013, Gulley-Hurst made all installment payments required under the $5,000,000 Note. *Id.* As required in the MSA, Gulley-Hurst timely paid all obligations owing to AmeriState Bank by MSW, and neither MSW nor any of its individual guarantors has been required to make any payments in connection with said Note. *Id.*

On Thursday, January 28, 2016, counsel for Gulley-Hurst and MSW appeared at the docket call for the Prior Lawsuit and announced that trial of the case set for

February 1, 2016, would not be necessary since the parties had resolved the matter by the MSA. CR V1, P.428. The parties did not go to trial on Monday, February 1, 2016, and neither party requested a new setting. *Id.*

On or about April 4, 2016, the Prior Lawsuit was dismissed for want of prosecution by either party without protest by either party. CR V1, P.429.

After the present lawsuit was filed, on or about December 20, 2016, MSW filed a Notice of Lis Pendens in the Nueces County real property records asserting an ownership interest in the Landfill. CR V1, P.1315. Gulley-Hurst was attempting to refinance the $5,000,000 Note with Prosperity Bank, but those efforts were terminated by the filing. CR V1, P.847. Gulley-Hurst later obtained approval for refinancing from Prosperity Bank subject to release of the Notice of Lis Pendens and a new appraisal. CR V1, P.848.

MSW argues that because Gulley-Hurst did not refinance the balance owing on the $5,000,000 Note in January 2016, MSW still should own one-half of the Landfill and be entitled to one-half of the profits. RR V20, P.56. At trial, MSW's expert, Allan Needham, Ph.D., CEA, testified that a June 2016 appraisal of the Landfill showed it had a market value of $35,470,000, so the market value of one-half interest would be $17,735,000. RR V19, P.57 and P.153-54. The difference between the market value of a one-half interest in the Landfill and the $7,500,000 stated purchase price in Section 2 of the MSA was $10,235,000. RR V19, P.57-58.

MSW's expert, however, confirmed on cross-examination that the only way he could show a positive number as damages for MSW was if the market value and purchase price were "flipped" since the market value actually was more than the purchase price. RR V19, P.75-76. He also admitted that he switched the numbers because he was told to do so by MSW's legal counsel. RR V19, P.97. Otherwise, there would be no damages to a seller due to a claimed default in closing by a buyer.

MSW's expert additionally testified as to the value of one-half of the profits of the Landfill as if MSW still owned one-half of the Landfill. RR V19, P.58-63. He deducted the costs of debt service on the $5,000,000 Note but did not deduct any debt service on the $3,500,000 Note. *Id.* and RR V19, P.63-64.

None of the undisputed facts or even the facts claimed by MSW support MSW's various theories of recovery in light of the documents themselves and the jury findings.

ARGUMENT

1. Issue No. 1 and Cross-Point No. 1. Damages Based on the Difference Between Contract Price and Market Value.

Since MSW did not exercise its right to purchase the Landfill as provided in Section 1 of the MSA, MSW became the *seller* of its one-half interest. MSW allowed its opportunity to buy Gulley-Hurst's half of the Landfill to expire, triggering an obligation to sell its own half of the Landfill to Gulley-Hurst. The damage issue submitted by the trial court recognized that MSW was the *seller*; Question 3(1) begins the damage calculation with "the price to be paid by Gulley-Hurst to purchase MSW's one-half interest in the Landfill." Gulley-Hurst timely objected to the submission of this jury question citing the relevant case authorities, and its objection was denied. RR V22, P.49.

But MSW persuaded the trial court to instruct the jury on a measure of damages appropriate to a disappointed *buyer*: the difference between the contract price and the increased market value of half the Landfill at the time of breach. *Id.* This error clearly was brought about by MSW.

A *seller* suffers damages when the buyer refuses to complete the purchase and the value of the property sold has *declined*. Then the seller is stuck with property worth less than the price it was entitled to receive under the contract. It has not lost the property or the value of the property; it has lost the portion of the promised purchase price in excess of the property's actual value.

When the buyer refuses to complete the purchase and the value of the property sold has *increased*, however, the seller experiences a windfall. The seller's property now is worth *more* than the price the seller was entitled to receive under the contract. To "flip" the arithmetic and award the seller that appreciation as damages is not to compensate loss. It is to double the windfall.

The testimony of MSW's expert confirmed that the arithmetic was being flipped.

> Q. Was it generally the formula you followed from the –
> A. It's flipped, the market value's at the top and the price of the seller's at the bottom.[1]
> Q. Okay. You flipped it from what the case law told you to do?
> A. That's --The interpretation that was provided to me by legal counsel…. [2]

The cases cited by MSW's expert were *Goldman v. Olmstead*, 414 S.W.3d 346 (Tex. App.–Dallas 2013, pet. denied) and *Barry v. Jackson*, 309 S.W.3d 135 (Tex. App.–Austin 2010, no pet.). Those cases set forth the well-settled rule that the measure of damages for breach of contract for the sale of real estate is "the difference between the contract price and the property's market value at the time of the breach." These cases accurately state the rule, but they do not award damages based on the rule, because in *Goldman* the market value was equal to the contract price, 414 S.W.3d at 361, and in *Barry*, the plaintiff failed to prove the market value, 309

[1] Trial Testimony of MSW's Expert at RR V19, P.76.

[2] Trial Testimony of MSW's Expert at RR V19, P.96-97.

S.W.3d at 140-42. So these cases do not illustrate how the rule works in practice.

When the victim of breach suffers a loss, the difference between contract price and market value is a standard measure of the loss. But first there must be a loss to measure. The cases uniformly apply the contract-market rule to disappointed sellers only when the seller suffers a loss because the market value is *less* than the contract price. Here, MSW claims that the market value of its half interest that it agreed to sell for $7.5 million had risen to $17,735,000. If the breach had resulted in MSW still owning its half interest, the difference in these two numbers would measure its *gain* from the breach, not a loss. If the damages were measured by the difference between the contract price and market value, MSW's damages would be zero.

Because MSW has already conveyed its half interest in the Landfill to Gulley-Hurst, it is entitled only to the remainder of Gulley-Hurst's obligations – to complete the refinancing of the $5,000,000 Note. The jury separately awarded damages for the delay in completing that refinancing.

Yazdani-Beioky v. Sharifan, 550 S.W.3d 808 (Tex. App.–Houston [14th Dist.] 2018, pet. denied), is remarkably similar. Yazdani agreed to buy out Sharifan's partnership interest for $12.5 million, and Sharifan transferred his interest to Yazdani, but Yazdani failed to pay. Sharifan claimed that his interest was worth $24 million. The court said that this valuation would negate contract-market damages. "If this court accepts Sharifan's testimony that his interest was valued at $24 million

at the time of alleged breach, then *this conclusively negated the existence of any damages because the difference between the contract price and the market value would be negative*." *Sharifan* at 833 (emphasis added).

Similarly here, the relative difference between contract price and market value for MSW's claim is negative $10.2 million. MSW cannot "flip" that number and create a loss where it suffered none. A higher market value of the property at the time of sale negates any damage claim of the seller based on the buyer's breach.

In *Sharifan,* as here, the seller already had conveyed the property to the buyer. So the measure of damages was the "benefit of the bargain" in getting the unpaid purchase price:

> Sharifan tendered his interest to Yazdani, and Sharifan's portion of the sale was complete, in August 2008. Yazdani never paid anything to Sharifan for his interest. Sharifan, the nonbreaching party, was promised and expected to receive $12.5 million for his interest and received $0. The difference between the value as represented (and expected to be received) and the value as received by Sharifan was $12.5 million.

Id. at 836.

The court in *Sharifan* cited three other recent Texas cases in which sellers who had fully performed recovered the contract price as the measure of damages, *id.* at 834-35, including this court's unpublished decision in *Synagro of Texas-CDR, Inc. v. Aon Risk Services of Texas, Inc.*, 2007 Tex. App. LEXIS 61, 2007 WL 29387 (Tex. App.–Corpus Christi 2007, pet. denied) ("When a party performs a contract

for which another party agreed to pay a certain sum of money, the party performing the contract may recover the contract price in a breach of contract action."). *Compare* Tex. Bus. & Comm. Code § 2-709 (unpaid seller who delivered goods can sue for the price).

If MSW still retained its half interest in the Landfill and the value had gone up, it would have no damages, as *Sharifan* recognized and as the Amarillo court recognized long ago:

> *If* Sneed [seller] was able and willing to convey the title, and Stinson [buyer], without just cause, refused to complete the purchase, and in the meantime *the value of the land had declined*, then Sneed's measure of damages was the difference between the contract price and the salable value, with interest thereon from the date of the breach. … *When the fair market value of the land at the date of the breach of the contract exceeds the stipulated price, the vendor's damages would be nominal.*

Stinson v. Sneed, 163 S.W. 989, 991 (Tex. Civ. App.–Amarillo 1914, no writ) (emphasis added).

As these cases indicate (and as MSW's expert initially assumed), sellers recover contract-market damages when the value of the property has declined, and the breach leaves them holding property worth less than the contract price. Other typical examples of such cases include *Kollmeyer v. Stewart*, 2001 Tex. App. LEXIS 8194 (Tex. App.–Dallas 2001, no pet.), in which Stewart contracted to sell a residence to Kollmeyer for $875,000, but Kollmeyer refused to close. The court determined that the market value was $800,000 and Stewart, the seller, was entitled

to recover the difference as her loss. The seller's damages were measured by the *decline* in value—not by an increase in value. *Kollmeyer* at 12.

Similarly, in *Wilkinson v. Goddard*, 278 S.W.2d 394 (Tex. Civ. App.–Waco 1955, no writ), Goddard agreed to sell his tavern business on Henderson Street in Dallas to Wilkinson for $3,250, and when Wilkinson defaulted, Goddard only could get $2,000 in a sale to a third party. The court upheld damages of $1,200. The seller's damages were measured by the *decline* in value—not by an increase in value. *Wilkinson* at 397.

In cases in which a *buyer* is suing a seller, the measure of damages based upon the difference between the contract price and market value is applied in the opposite manner. A buyer cannot suffer a loss "unless the market value exceeds the contract price." *Johnson v. Price*, 1985 Tex. App. LEXIS 7394 *3 (Tex. App.–Houston [14th Dist.] 1985, no writ).

Even if the property had not already been conveyed, nothing under the law would permit MSW to flip the numbers and claim, as a seller of property, that it is entitled to the difference between the *increased* market value and the contract price. That difference that would measure a *buyer's* damages in the event of a default. MSW's expert had the correct initial understanding of the law based on the cases and common sense – a seller can be damaged only if it suffers a loss because the market value of a property has declined to below an agreed contract price.

MSW's error flows directly from the more fundamental error in MSW's damage theory. Its theory flouts the most fundamental purpose of contract damages, which is to put the victim of a breach in the position it would have occupied if the contract had been performed. MSW initially misled the trial court with an argument that was brash, confused, and deceptive, but the trial court corrected its error. In its appeal, MSW's mischaracterization of the MSA has continued. MSW now prefers that the court of appeals lose sight of the big picture.

The basic principle of contract damages is, of course, long-settled in the common law and in the law of Texas. Judicial remedies for breach of contract protect the plaintiff's "'expectation interest,' which is his interest in having the benefit of his bargain by being placed in *as good a position as he would have been in had the contract been performed*." *Restatement (Second) of Contracts* § 344(a)(1) (1981) (emphasis added). The point is repeated in *id.* § 347 cmt. *a*. An obvious corollary of this principle is that no remedy should make plaintiff better off than it would have been if the contract had been fully performed.

Texas courts have recognized that "The basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, *to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed*." *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 419 (Tex. 2011)

(emphasis added) (quoting *Am. Nat'l Petroleum Co. v. Transcontinental Gas Pipeline Corp.*, 798 S.W.2d 274, 278 (Tex. 1990)); accord, *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 818 (Tex. 2005). Therefore, damages cannot "put the non-breaching party in a better position than if the contract had been performed." *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 113 (Tex. 2018) (quoting *Metal Bldg. Components, LP v. Raley*, 2007 Tex. App. LEXIS 186, 2007 WL 74316, *19 n.22 (Tex. App.–Austin 2007, no pet.)). *See also Miga v. Jensen*, 96 S.W.3d 207, 216 (Tex. 2002) (rejecting plaintiff's damage theory because it would "make him better off than he would have been had the agreement been honored").

This court has repeatedly reaffirmed and applied this principle. "The measure of damages for a breach of contract is the benefit-of-the-bargain measure, the purpose of which is to restore the injured party to the economic position it would have been in had the contract been performed." *Kempner Water Supply Corp. v. City of Lampasas*, 2019 Tex. App. LEXIS 615, 2019 WL 386136, *8 (Tex. App.–Corpus Christi 2019, no pet.); Accord *Robinson v. Ochoa*, 2018 Tex. App. LEXIS 2431, 2018 WL 1633516, *5 (Tex. App.–Corpus Christi 2018, pet. denied); *First Cash, Ltd. v. JQ-Parkdale, LLC*, 539 S.W.3d 189, 201 (Tex. App.–Corpus Christi 2018, no pet.); *Direct Advertising, Inc. v. Willow Lake, L.P.*, 2016 Tex. App. LEXIS 3542, 2016 WL 1393974, *4 (Tex. App.–Corpus Christi 2016, no pet.); *Hansen v. Jackson*, 519 S.W.3d 614, 633 (Tex. App.–Corpus Christi 2014), *rev'd on other grounds sub*

nom. Community Health Sys. Prof. Servs. Corp. v. Hansen, 525 S.W.3d 671 (Tex. 2017); *Bus. Prod. Supply v. Marlin Leasing Corp.,* 2013 Tex. App. LEXIS 10920, 2013 WL 7141350 (Tex. App.–Corpus Christi 2013, pet. denied). Few legal principles are better settled or more familiar than this.[3]

Other courts of appeals are equally committed to the corollary of this principle: If the purpose of contract damages is put the plaintiff in the position it would have occupied if the contract had been performed, then a contract plaintiff cannot be made *better off* than if the contract had been performed. *Powell Elec. Sys. Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 127 (Tex. App.–Houston [1st Dist.] 2011, no pet.) ("plaintiff is not to be put in a better position by the recovery of damages for the breach of contract than he would have been if there had been performance"); *Employees Retirement Sys. of Tex. v. Putnam, LLC*, 294 S.W.3d 309, 321 (Tex. App.–Austin 2009, no pet.) (applying "the principle of contract law that a non-breaching party may not be placed in a better position than if the contract had been performed.").

Where would MSW have been if the MSA had been fully and timely performed? It would not have owned the Landfill. It would not have owned half the Landfill. It would not have owned any part of the Landfill. It would have been

[3] To the same effect, see, e.g., *Parkway Dental Assocs., PA v. Ho & Huang Props., LP*, 391 S.W.3d 596, 607 (Tex. App. – Houston [14th Dist.] 2012, no pet.); *Mays v. Pierce,* 203 S.W.3d 564, 577 (Tex. App. – Houston [14th Dist.] 2006, pet. denied).

completely released from liability on the $5,000,000 Note by a refinancing in a form compliant with the MSA, and it would have retained no interest in the Landfill.

Because MSW would have owned no interest in the Landfill if the MSA had been fully performed, the value of the Landfill cannot be the measure of damages. Neither the Landfill nor its value forms any part of the position MSW would have occupied if the MSA had been performed. A decline in the value of the Landfill, if there had been a decline and if MSW had retained its interest, could be used to measure how much of the promised purchase price MSW had lost. But MSW did not lose any interest in the Landfill; its obligation was to sell that interest. If Jury Question 3(1) were permitted, then such proposed compensation for half the value of the Landfill would put MSW in a position radically different from the position it would have occupied if the MSA had been performed.

MSW's position after the verdict was not just different from the position it would have occupied if the MSA had been performed; it was far better than that position. The verdict awarded damages based on the value of half the Landfill, even though MSW would have owned no interest in the Landfill if the MSA had been performed. As noted above, this improvement in MSW's position violates a basic remedies principle of the Supreme Court: damages cannot "put the non-breaching party in a better position than if the contract had been performed." *Sky View at Las Palmas* at 213. *See also Miga v. Jensen*, 96 S.W.3d 207, 216 (Tex. 2002) (rejecting

plaintiff's damage theory because it would "make him better off than he would have been had the agreement been honored").

But it gets worse. Part of MSW's theory is that MSW still owns half the Landfill.[4] The trial court has correctly rejected this claim, but consider its implications. MSW still claims that it owns half of the Landfill *and* that it is also entitled to compensation based on the increased value of half the Landfill. Half the Landfill plus the value of half the Landfill would be an obvious double recovery even if MSW were entitled to half the Landfill under the MSA, which it was not. MSW's proposed remedy is wholly unprecedented, and it puts MSW in a vastly better position than if the MSA had been fully performed.

MSW's expert witness testified that it claimed damages based on the value of half the Landfill because MSW had been unable to sell its half while this dispute was litigated.[5] This damages model relies upon the assumption that MSW is still the owner of a half interest in the Landfill, which it is not. MSW could not sell the Landfill a second time because it had already sold the Landfill to Gulley-Hurst and had already conveyed its interest to Gulley-Hurst.

The only thing the jury verdict Question 3(1) measures is the windfall MSW would have reaped if the breach had somehow enabled MSW to retain half

[4] See trial testimony of MSW's Expert at RR V19, P.83; Appellant's Br. 12.
[5] See trial testimony of MSW's Expert at RR V19, P.57, 83 & 90.

ownership interest in the Landfill, which it did not. The point can also be put in terms of causation. Gulley-Hurst's breach did not cause MSW to lose its interest in the Landfill. MSW already had irretrievably lost that interest by its own free and voluntary decision not to exercise its opportunity to buy out Gulley-Hurst. That decision triggered MSW's obligation to sell to Gulley-Hurst. The damages awarded by the jury in response to Question 3(1) are wholly unrelated to any harm caused by the breach; and these damages awarded by the jury put MSW in a vastly better position than if the MSA had been fully and timely performed.

The issue is not whether MSW's expert was qualified by knowledge, skill or training to testify about these matters under TEX. R. EVID. 702. The problem fundamentally is that, on the face of the record, the measure of damages submitted to the jury is inapplicable to the case at bar. In such cases, the claimed damages are legally insufficient as a matter of law, and no objection or prior challenge under *Daubert-Robinson* is required. *Coastal Transp. Co. v. Crown Cent. Petro. Corp.*, 136 S.W.3d 227, 229 (Tex. 2004). "Where damages evidence does not relate to the amount of damages sustained under the proper measure of damages, that evidence is both irrelevant and legally insufficient to support a judgment." *Kempner* at *22 (quoting *Garza de Escabedo v. Haygood*, 283 S.W.3d 3, 6 (Tex. App.–Tyler 2009), *aff'd*, 356 S.W.3d 390 (Tex. 2011)).

That is the case here. MSW's damage evidence is based on the completely

erroneous theories that it would have owned half the Landfill if the MSA had been timely performed, that it still owns half the Landfill even though the court has ruled otherwise, and that it is entitled to half the appreciation of the Landfill as damages. MSW's claims are inconsistent with the most basic principles of contract damages, and these claims cannot support the verdict or a judgment. Texas law fully supports the trial court's grant of judgment notwithstanding the verdict.

2. Issue No. 2. Lost Profits Claim.

In this issue, MSW claims that the trial court should have submitted to the jury an issue concerning alleged lost profits to be calculated as if MSW continued to own one-half of the Landfill. Again, MSW is attempting to recover damages that would put it in a completely different position from where it would be had the required refinancing been completed on time.

The jury's sole finding of default was the failure to complete the refinancing within 120 days. MSW did not show that it ever was required to make any installment payments on the $5,000,000 Note, and if such were the case that clearly would be damages for the failure to refinance on time. Instead, MSW makes the surprising claim that the failure to refinance on time somehow equates to transferring ownership of one-half of the Landfill back to MSW. Nothing in the jury finding or in the MSA divests Gulley-Hurst of its ownership of the Landfill previously completed by the conveyance from MSW.

The two primary "lost profits" cases cited by MSW pertain to a breach in a typical purchase contract in which the seller fails to close the transaction. The buyer would have owned the asset had the seller not defaulted, so the buyer has a claim for the profits that the buyer reasonably would have received with ownership.

Sharifi v. Steen Auto., LLC, 370 S.W.3d 126 (Tex. App.–Dallas 2012, no pet.) involved the seller of a transmission repair business who refused to close the transaction. *Id.* at 134. The court confirmed that benefit-of-the-bargain damages seek to "restore injured party to the economic position it would have been in had contract been performed." *Id.* at 148. If the MSA had been timely performed by Gulley-Hurst, the $5,000,000 loan would have been refinanced. MSW would not still have been the owner of one-half of the Landfill.

In *Cherokee County Cogeneration Partners, L.P. v. Dynegy Mktg. & Trade*, 305 S.W.3d 309 (Tex. App.–Houston [14th Dist.] 2009, no pet.), the seller of natural gas in a take-or-pay purchase agreement refused to sell the quantity of gas required. *Id.* at 311. The court ruled that the buyer was entitled to recovery of the difference between the market value of the gas that should have been delivered and the contract price as its lost profits. *Id.* at 315. Again, the spurned buyer in this case was entitled only to what it would have had if the contract had not been breached. The same scenario applies in *Swink v. Alesi*, 999 S. W.2d 107 (Tex. App.–Houston [14th Dist.] 1999, no pet.), in which the seller of a foam business continued to sell foam in

violation of the agreement and the buyer recovered $1,500 in damages due to lost sales. *Id.* at 108.

A similar pattern holds in the other cases cited by MSW, although not involving a breach of contract by a seller. In *N. Cypress Med. Ctr. Operating Co., Ltd. v. St. Laurent*, 296 S.W.3d 171 (Tex. App.–Houston [14th Dist.] 2009, no pet.), a doctor was forced to sell his shares in a hospital operating partnership, which he claimed was wrongful, so the measure of damages in lost profits was what he would have received had the forced sale not occurred. *Id.* at 175. Still, the doctor only would be receiving the profits he would have obtained had the defendant not breached the agreement by requiring the forfeiture of his shares.

In *Cmty. Dev. Serv., Inc. v. Replacement Parts Mfg., Inc*., 679 S.W.2d 721 (Tex. App.–Houston [1st Dist.] 1984, no writ), the buyer of 144 residential lots failed to purchase of all of them. The seller could include as damages the profit that the seller would have made on the sale of each lot. *Id.* at 725. Again, the seller only was recovering what the seller would have received had the buyer performed under the contract.

Similar to the arguments raised concerning Issue No. 1, MSW cannot recover as damages something different from what it would have had if the MSA had been fully performed. It only can recover its benefit of the bargain. After MSW conveyed title to the Landill to Gulley-Hurst, it had no interest any of the profits. The profits

earned from operation of the Landfill have no bearing whatsoever on any damages suffered due to the failure to refinance the $5,000,000 Note on a timely basis.

3. Issue No. 3. No Creation of an Option Contract.

MSW also contends that the MSA somehow only created an option for Gulley-Hurst to purchase the undivided one-half interest of MSW, despite the clear, unambiguous terms of the MSA requiring MSW to provide clear title to the Landfill.

The courts have uniformly held that the primary test for determining whether a contract is an option contract is whether the contract imposes a mandatory obligation on the seller to accept a stipulated sum as liquidated damages in lieu of the purchaser's continued liability. *Paramount Fire Ins. Co. v. Aetna Casualty & Surety Co.*, 353 S.W.2d 841, 843 (Tex. 1962); *Chambers County & Comm'rs Court v. TSP Dev., Ltd.*, 63 S.W.3d 835, 838 (Tex. App.–Houston [14th Dist.] 2001, pet. denied). If there is not such a provision for a stipulated sum, such as earnest money or an option fee, it is a sales contract. *Paramount* at 843. For an agreement to be an option contract, the seller's only remedy is retention of the earnest money or option fee; if that is not the case, it is not an option contract. *Chambers County* at 838; *Seelbach v. Clubb*, 7 S.W.3d 749, 756 (Tex. App.–Texarkana 1999, pet. denied) and *Cadle Co. v. Harvey*, 46 S.W.3d 282,286 (Tex. App.–Fort Worth 2001, pet. denied).

No type of liquidated damages provision such as earnest money or an option fee exists in the MSA. The term "option" is never used in Section 2 of the MSA,

and none of the obligations on MSW are in any way conditional upon completion of the refinancing by Gulley-Hurst. The clause simply reads:

> In such event, 120 days after the execution of this Agreement MSW shall provide clear title to GH by special warranty deed to its one-half interest subject only to those conditions of title accepted in the purchase of its one-half of the Landfill in September 2011, the liens in favor of AmeriState Bank securing the $5,000,000 loan, the liens securing the $200,000 loan originally in favor of AmeriState Bank, and any liens created or permitted by GH in its operation of the Landfill since August 2013.

MSW had an unconditional obligation to provide clear title, and the $5,000,000 Note is specifically listed as a permitted exception to the clear title requirement. MSW cannot now argue that somehow the language requires that the liens of the $5,000,000 Note be released and refinanced prior to the conveyance of clear title. Nothing in the MSA even suggests such a pre-condition.

In order to make performance specifically conditional, terms such as "if", "provided that", "on condition that", or some similar phrase of conditional language must normally be included. *Landscape Design v. Harold Thomas Excavating,* 604 S.W.2d 374, 377 (Tex. Civ. App.–Dallas 1980, writ ref'd n.r.e.). If no such language is used, the provision will be construed as a covenant, not a condition. The absence of any of the foregoing phrases is probative of the parties' intention that a promise be made, rather than a condition imposed. *Criswell v. European Crossroads Shopping Center, Ltd.*, 792 S. W.2d 945, 948 (Tex. 1990).

MSW cites *Dittman v. Cerone*, 2013 Tex. App. LEXIS 13404 (Tex. App.–

Corpus Christi-Edinburg 2013, no pet.) in its argument that an option contract exists, but that case involved an agreement specifically providing a "twenty-four (24) month option to purchase…" a particular property. *Id.* at 8. No such language exists in the MSA making it an option contract.

4. Issue No. 4. MSW Did Not Convey Its Interest to Gulley-Hurst.

In this issue, MSW claims that the Court should not have granted summary judgment on Counts 1 (Declaratory Judgment), 12 (Trespass to Try Title) and 13 (Quiet Title) of its various amended petitions. The primary basis is a never previously-communicated intention expressed by Noons that he never meant to convey title. That intention was not communicated on September 29, 2015, by Noons or by his legal counsel at that time when his counsel delivered the executed Deed to Gulley-Hurst.

The undisputed record concerning the delivery of Deed and the Transfer in exchange for the $3,500,000 Note on September 29, 2015, is clear and simple. After an exchange of letters between counsel for the parties on different options, the parties' counsel confirmed by email that the Deed and Transfer and the $3,500,000 Note would be exchanged through FEDEX, and the Note would be marked "PAID IN FULL" upon Gulley-Hurst's confirmed receipt of the Deed and Transfer. CR VI, P.426 and P.436. No other conditions were expressed and nothing was communicated about any intention that the delivered Deed somehow was not being

delivered. No new agreement was made concerning performance of the mandatory provisions of the MSA.

While numerous cases hold that intent to convey is critical to any conveyance, MSW can point to no cases in which an unexpressed intention not to convey invalidates delivery of a deed. In *Raymond v. Aquarius Condo. Owners Assoc.*, 662 S.W.2d 82 (Tex. App.–Corpus Christi 1983, no writ), the appellants claim that they never acquired title to two condominiums because they did not intend to do so, even though the deeds were accepted and recorded by their attorney. The conveyance was deemed to have occurred. *Id.* at 91. *Bennett v. Mings*, 535 S.W.2d 408 (Tex. Civ. App.–Texarkana 1976, writ ref'd n.r.e.) involved a 91 year-old woman who executed a deed of her residence to her nephew but retained it and did not deliver it to him. When he took the deed and recorded it without her consent, the court ruled that Mrs. Mings should recover title to her property. *Id.* at 410. See also *Binford v. Snyder*, 189 S.W.2d 471, 472 (Tex. 1945) (grantee acknowledged that the deed had been delivered to him in trust in order to resell the property for an agreed amount); and *Adams v. First Nat'l Bank of Bells/Savoy,* 154 S.W.3d 859, 870 (Tex. App.–Dallas 2005, no pet.) (owner who executed deed to her corporation and represented to lenders it was a corporate asset was denied relief by claiming she never intended to transfer property).

It has long been the law that "A secret or undisclosed intent not to convey

title, or a subsequent change of intent, will not affect the conveyance." *Paull & Partners Invs., LLC v. Berry*, 558 S.W.3d 802, 811 (Tex. App.–Houston [14th Dist.] 2018, no pet.). See *Kahn v. Kahn*, 58 S.W. 825 (Tex. 1900) and *Bates v. Bates*, 270 S.W.2d 301 (Tex. Civ. App.–El Paso 1954, no writ). The trial court was correct in ignoring the self-serving testimony about an undisclosed and secret intention concerning the Deed never raised at the time of delivery of the Deed.

MSW also attempts to claim a failure of consideration or that the consideration clause in the Deed somehow was conditional. When the evidence shows that a claimant has received at least one benefit under the agreement, a claim of failure of consideration is completely negated. *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315 (Tex. App.–Houston [14th Dist.] 2011, no pet.); *Stuard v. Vick*, 9 S.W.2d 494 (Tex. App. 1928, no writ). In this case, the undisputed evidence was that Gulley-Hurst had written off the $3,500,000 Note as required by the MSA and delivered the original to MSW's counsel, so Gulley-Hurst at least partially performed under the MSA.

Further, the wording of the Consideration clause itself confirms the Grantor's acknowledgement of the consideration by stating "the receipt and sufficiency of which is acknowledged." CR V1, P.508 [Deed], CR V1, P.512 [Transfer]. The only contemporaneous exchange for the Deed and Transfer at the time of delivery was the $3,500,000 Note, and that document had been properly delivered. That delivery,

coupled with the promise to refinance the $5,000,000 Note, was the consideration for the Deed and Transfer, and the promise to refinance was documented by and enforceable through the MSA.

Deeds to properties commonly recite consideration of "$10.00 and other consideration." The subsequent words in the Consideration clause "pursuant to a Mediated Settlement Agreement in Cause No. 2013CCV-61449-2, Gulley-Hurst L.L.C. v. MSW Corpus Christi Landfill, Ltd. and Blue Door Properties Limited, Inc. pending in the County Court at Law No. 2 in Nueces County, Texas" simply were a recital as to why the transaction was occurring such as found in a distribution deed in a decedent's estate or in a divorce. Nothing in the recital made the conveyance conditional. In fact, it refers to the binding requirements of the MSA by which MSW was required to "provide clear title."

Lastly, MSW argues that somehow the jury implicitly found that MSW still owned one-half of the Landfill when it gave a negative response to Question 10 as to whether MSW wrongfully interfered with the prospective business relationship between Gulley-Hurst and Prosperity Bank in 2019 by sending letters asserting an ownership interest in the Landfill. The question provided detailed instructions as to what was required for a business relationship to exist and when interference would be deemed intentional. CR V2, P.3171.

While apparently in a criminal case a jury verdict of guilty includes an implicit

finding that rejects defenses asserted, no such rule can be found to exist in civil cases. See *Jackman v. State*, 2016 Tex. App. LEXIS 9726 (Tex. App.–El Paso 2016, no pet.). Numerous reasons can exist why the jury found that no tortious interference was committed by MSW's letters in response to Jury Question 10; however, the existence or non-existence of tortious interference is unrelated to whether or not title was conveyed by the Deed.

MSW could not establish a case for trespass to try title under its Count 12 since it could not claim to ***possess*** title or that it ***has established*** title because it voluntarily conveyed title to Gulley-Hurst by the Deed and Transfer. MSW no longer had any title to the Landfill whatsoever. It could not meet the basic requirements to prevail on the superiority of its title as required in *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004).

In order to prevail in a suit to quiet title as claimed in Count 13, a plaintiff must prove as a matter of law that he has a right of ownership and that the adverse claim is a cloud on the title that equity will remove. *Essex Crane Rental Corporation v. Carter*, 371 S.W.3d 366, 388 (Tex. App.–Houston [1st Dist.] 2012, pet. denied). Again, MSW was required to "provide clear title" to Gulley-Hurst in Section 2 of the MSA, and it did so by delivery of the Deed pursuant to the terms of the MSA. It cannot now claim that it still holds legal title to the Landfill.

In summation, the terms and conditions of MSW's delivery of the Deed and

the Transfer to Gulley-Hurst on September 29, 2015, were clear and cannot be rebutted by an undisclosed intention contrary to the communications when the Deed was delivered. Summary judgment based on the undisputed facts that MSW was not entitled to declaratory judgment that it still owned one-half of the Landfill and denial of its claims for trespass to try title or to quiet title was correct and should be affirmed.

5. Issue No. 5. MSW Should Not Have the Remedy of Rescission.

MSW contends that if it is not granted the remedy of damages equivalent to the market value of one-half of the Landfill and one-half of the operating profits, it should be granted the equitable remedy of rescission.

The courts have long maintained that "A party cannot avoid his contract on the ground that he received less in value than he supposed, or that what he has received has no value at all unless he shows additional facts entitling him to equitable relief such as fraud or mistake." *Chenault v. County of Shelby,* 320 S.W.2d 431, 433 (Tex. Civ. App.–Austin 1959, writ ref'd n.r.e.). See also *Martin v. Cadle Co.,* 133 SW.3d 897, 903 (Tex. App.–Dallas 2004, pet. denied). MSW failed to show any fraud in inducement of the MSA at a mediated settlement conference with Marvin Nebrat and never claimed nor plead mistake.

MSW cites *Mustang Pipeline Co. v. Driver Pipeline Co.,* 134 S.W.3d 195 (Tex. 2004) as authority on rescission, but that case solely pertained to a party being

relieved of performing obligations remaining after the other party's default. *Mustang* at 196. In the present case, the sequence of events required by the MSA was clear. If MSW did not exercise its right to purchase in 120 days, it would provide clear title and Gulley-Hurst would cancel the $3,500,000 Note. Gulley-Hurst then had 120 days to complete arrangements for the refinancing.

Further, the courts routinely have held that a plaintiff must have refused the benefits of the contract and not continued to benefit from the contract after learning of the grounds for rescission. *Carrow v. Bayliner Marine Corp*., 781 S.W.2d 691, 696 (Tex. App.–Austin 1989, no writ). Specifically, the *Carrow* court noted that "To establish a right to equitable rescission, the consumer must satisfy several requirements, which include: (1) giving timely notice to the seller that the contract is being rescinded, and (2) returning or offering to return the property received and the value of any benefit derived from its possession." c*iting David McDavid Pontiac, Inc. v. Nix*, 681 S.W.2d 831, 835-36 (Tex. App.–Dallas 1984, writ ref'd n.r.e.). The party seeking rescission carries the burden of proof on these issues. *Carrow* at 696.

In this case, MSW retained the $3,500,000 Note that had been provided by Gulley-Hurst for cancellation under Section 2 of the MSA, and it continued to enjoy the benefit of Gulley-Hurst's making all the installment payments on the $5,000,000 Note as provided in Section 8 of the MSA. It waited over a year after accepting those benefits before filing this lawsuit in December 2016 and continues to enjoy

them today.

In *Spellman v. American Universal Investment Company*, 687 S.W. 2d 27, 30 (Tex. App.–Corpus Christi, 1984, no writ), the Court of Appeals held that any act based on a recognition of the contract as subsisting, or any conduct inconsistent with an intention of avoiding it, has the effect of waiving the right of rescission. As a result, the retention of a beneficial part of the transaction affirms the contract and would bar any action for rescission as a matter of law. *Spellman* at 30; citing *Daniel v. Goesl*, 341 S.W.2d 892 (Tex. 1960).

The Texas Supreme Court is very clear in noting that rescission is not a one-way street. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826 (Tex. 2012). It requires a mutual restoration and accounting, in which each party restores property received from the other. *Citing* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. d. The Court noted that "Rescission is mutual: a plaintiff seeking to be restored to the status quo ante must likewise restore to the defendant whatever the plaintiff has received in the transaction." *Cruz* at 826. The undisputed evidence confirming MSW's continued enjoyment of the benefit of Gulley-Hurst's making all of the required payments under the $5,000,000 Note and MSW's retention of the $3,500,000 Note clearly shows that MSW only is interested in one side of the rescission.

In *Humphrey v. Camelot Retirement Cmty.* 893 S.W.2d 55 (Tex. App.–Corpus

Christi 1994, no writ) cited by MSW, the seller not only failed to provide the title binder at the required time but also failed to start construction on time and required an extension of the closing deadline. *Id.* at 58. The *Humphrey* court noted that "The decision whether to grant rescission lies within the trial court's sound discretion." citing *Schenck v. Ebby Halliday Real Estate, Inc*., 803 S.W.2d 361, 366 (Tex. App.–Fort Worth 1990, no writ); and *Ebberts v. Carpenter Prod. Co*., 256 S.W.2d 601, 627 (Tex. Civ. App.–Beaumont 1953, writ ref'd n.r.e.). In such cases, the trial court's decision only may be reversed for a clear abuse of discretion after reviewing the evidence in the light most favorable to the trial court's action. *Simon v. York Crane & Rigging Co*., 739 S.W.2d 793, 795 (Tex. 1987); and *Adams v. Reagan*, 791 S.W.2d 284, 287 (Tex. App.–Fort Worth 1990, no writ).

In the present case, the trial court was justified in denying the equitable remedy of rescission based on MSW's failure to show any evidence of fraud or mistake in agreeing to the MSA. Additionally, the trial court was justified due to MSW's retention of the benefits it received under the MSA including cancellation of the $3,500,000 Note and Gulley-Hurst continuing to make all the payments required on the $5,000,000 Note. MSW and its guarantors had adequate remedies available at law for damages under its contract claims.

6. Issue No. 6. A Combination of Ten Different Counts Resolved in Three Different Motions for Summary Judgment.

MSW devoted less than two pages of its argument to this Issue, not even

articulating the substance of the ten different counts it claims were improvidently stricken by the trial court through summary judgment.

The first group of claims: Count 2 (Constructive Trust), Count 3 (Preliminary and Permanent Injunctive Relief), Count 4 (Breach of Contract), and Count 5 (Breach of Fiduciary Duty) all pertain to the 2011 Commercial Contract and the 2011 Operating Agreement. Any claims under those agreements were compromised and settled by the MSA, and in the event of an alleged breach of a settlement agreement, the proper remedy is for damages caused by the breach or specific performance. *Stewart v. Mathes*, 528 S.W.2d 116, 119 (Tex. Civ. App.–Beaumont 1975, no writ). The sole breach claimed was the failure to complete the refinancing on time.

MSW attempts to conflate the jury's findings of breach of the obligation to timely refinance the $5,000,000 Note in the MSA into a deemed invalidation of the MSA entirely. No such findings by the jury were made. The trial court was correct in its determination that the sole remedy available for Gulley-Hurst's failure to refinance the loan was damages.

The remaining Counts pertain to the delivery of the Deed by MSW to Gulley-Hurst on September 29, 2015: Count 6 (Breach of an Escrow Agreement), Count 7 (Breach of Bailment), Count 8 (Breach of Fiduciary Duty under an Escrow Agreement), Count 9 (Conversion of the Deed), Count 10 (Negligence/Gross

Negligence), and Count 11 (Fraud/Fraudulent Inducement). Again, the jury's finding of breach of the MSA by Gulley-Hurst's failure to timely complete refinancing the loan does not somehow create an escrow or bailment agreement between two attorneys concerning the delivery of the Deed when the unrebutted evidence was that no such thing occurred. The admissions by Mike Hurst in his deposition testimony that Gulley-Hurst had not timely completed the refinancing did not create those obligations either.

Section 2 of the MSA clearly set out the steps to be taken by the parties if MSW did not exercise its right to purchase the Landfill, and the respective counsel for MSW and Gulley-Hurst following those steps was not in any way impacted by the jury's findings of subsequent default by Gulley-Hurst in completing the refinancing. Since MSW did not seek specific performance of the obligation to refinance as a remedy, its sole remedy would be its damages, if any, due to failure to timely complete the refinancing, and the proper measure of such damages is contested in the other issues presented.

Summary judgment on the ten different counts of Constructive Trust, Preliminary and Permanent Injunctive Relief, Breach of Contract, Breach of Fiduciary Duty, Breach of an Escrow Agreement, Breach of Bailment, Breach of Fiduciary Duty under an Escrow Agreement, Conversion of the Deed, Negligence/Gross Negligence, and Fraudulent Inducement was correct and should

be affirmed.

7. Issue No. 7. Fraud Claim.

As the final issue, MSW claims that it would have purchased the Landfill during its 120-day period but for Gulley-Hurst's alleged misrepresentation and failure to disclose information about the Landfill. The trial court granted summary judgment on this part of Count 11 on several bases.

First, "no duty of disclosure arises without evidence of a confidential or fiduciary relationship." *Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (providing examples in which fiduciary duties arise as a matter of law). As to co-owners of real estate, "[a]bsent an agreement to the contrary, a cotenant has no fiduciary obligation to the other cotenants." *Glover v. Union Pac. R.R.*, 187 S.W.3d 201, 218 (Tex. App.–Texarkana 2006, pet. denied) (citing *Scott v. Scruggs*, 836 S.W.2d 278, 282 (Tex. App.–Texarkana 1992, no writ)); *Donnan v. Atl. Richfield*, 732 S.W.2d 715, 717 (Tex. App.–Corpus Christi 1987, writ denied). As a result, as noted by the court of appeals, "A failure to disclose is fraud only when there is a duty to disclose." *Glover* at 218.

In this case, the sole relationship between Gulley-Hurst and MSW was as tenants in common concerning the Landfill. As cotenants, neither Gulley-Hurst nor MSW were under a duty to make disclosures otherwise required of parties in a fiduciary relationship. Even if Gulley-Hurst knew of a buyer of the Landfill, Gulley-

Hurst had no duty to disclose this information because no fiduciary relationship existed between it and MSW. The parties were merely cotenants of a piece of real estate.

The same principle applies to the added claim of failure to disclose financial information concerning the Landfill. MSW had adequate opportunity during the pendency of the Prior Lawsuit to obtain through discovery whatever financial information it wanted. MSW never made any written demands for additional financial information after the MSA was made in May 2015, and Gulley-Hurst had no duty to make any further disclosure as a tenant in common.

Moreover, Section 152.052(b)(2) of the TEX. BUS. ORG. CODE provides that certain factors, such as "co-ownership of property, regardless of whether the co-ownership: (A) is a joint tenancy, tenant in common, tenancy by the entirety, joint property, community property, or part ownership; or (B) is combined with sharing of profits from the property," do not indicate that a partnership has been created. In the absence of a partnership, no fiduciary obligations exist.

The sole agreement existing between the parties was the MSA executed on May 27, 2015. By its expressed terms, the MSA was the entire agreement of the parties, and Section 14 provided there were "no other understandings or agreements, oral or written, which constitute a part of the agreement of the parties." RR V24, PX 48. As a result, no partnership, agency, or other type of fiduciary relationship

could have existed during the 120-day period that MSW had to complete its purchase pursuant to the MSA.

Second, the Texas Supreme Court's position that it has declined to impose any duty of disclosure in an arms-length business transaction or adopt Section 551 of the Restatement of Torts has been recently confirmed in *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 562 (Tex. 2019). In that case, the Supreme Court reversed and rendered in an appeal from a District Court in Cameron County in which a jury returned a verdict of $15.3 million plus punitive damages in an alleged fraudulent inducement of Carduco to enter into a dealer agreement with Mercedes-Benz. *Id.*

In the *Mercedes-Benz* case, Carduco actually invested in a dealership for a Harlingen location which he planned to relocate to McAllen and had communicated those plans to Mercedes-Benz officials during the negotiations. When Mercedes-Benz awarded a dealership to another firm for a site near McAllen and denied Carduco's request to relocate, he sued for fraud. *Id.* The court affirmed its ruling in *Bradford v. Vento* that the parties owed no duty of disclosure in an arm's length commercial transaction. As noted by the Supreme Court in 2001, whether a duty to speak exists under the circumstances is a question of law for the court. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001).

Third, while fraud by nondisclosure that induces inaction can be actionable in

some cases, none of those elements are present for MSW which did not exercise its right to purchase the Landfill. In *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213 (Tex. 2019), plaintiff SPEP in that case actually purchased the aircraft. *Bombardier* at 219. Its claimed inaction was in not inspecting the aircraft engines due to Bombardier's representations. *Id*.

In *Hill v. Imperial Savings*, 852 F. Supp. 1354 (W.D. Tex. 1992), the plaintiffs could show no injury because they did not actually purchase the property that was the subject of the alleged misrepresentation. Although the plaintiffs alleged that they were ready and fully able to close the transaction, but declined to do so because of the alleged fraud, the court did not consider that close enough. The court noted "The plaintiffs did not purchase the Property, thus, they did not rely upon any misrepresentation, and they have no claim for damages." *Hill* at 1370. In the present case, MSW made no showing, and did not even allege, that it was ready, willing and able to close the purchase under Section 1 of the MSA for the stated cost of $13,500,000. It's easy to see about 13,500,000 reasons why that was not the case.

MSW's various damage models all relate to what it could have had if it actually had purchased the Landfill. The Texas Supreme Court established the standard for measuring damages from fraud as follows: "where one is induced by fraud to enter into a contract to his loss, the measure of his damages is the difference between the value of what he parted with and what he received under the contract,

such difference being regarded as the only actual loss involved." *Morriss-Buick Co. v. Pondrom*, 113 S.W.2d 889, 890 (1938). The Texas Supreme Court provided an updated application of this standard in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) noting that direct damages include out-of-pocket damages which "measure the difference between the value the buyer has paid and the value of what he has received" and benefit-of-the-bargain damages which "measure the difference between the value as represented and the value received." *Arthur Anderson* at 817. In each situation, the plaintiff actually purchased something in order to have a claim for those damages, but in the present case MSW did not actually purchase anything.

All of the remaining fraud cases cited by MSW involve a plaintiff actually purchasing or investing in something. See *Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, (Tex. 1979) (purchasers bought a lot in a planned resort community); *Campbell v. Booth*, 526 S.W.2d 167 (Tex. Civ. App.–Dallas 1975, writ ref'd n.r.e.) (couple purchased a residence); *Guevara v. Lackner*, 447 S.W.3d 566, 578 (Tex. App.–Corpus Christi 2014, no pet.) (Dr. Guevara invested $154,000 in enterprise); and *Playboy Enters. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250 (Tex. App.–Corpus Christi-Edinburg 2006, pet. denied) (Mexican publisher invested in a Spanish language version of Playboy magazine).

Additionally, another element in establishing a claim for fraud outlined by the

Supreme Court is that the plaintiff was ignorant of the facts and did not have an equal opportunity to discover them. *Bombardier* at 219. In the present case, the Prior Lawsuit remained pending, and MSW retained the ability through discovery to obtain any financial it required. MSW failed to produce any evidence of even a written request for information.

The trial court afforded MSW multiple extensions in the summary judgment proceedings to produce any evidence of a cause of action for fraud and delayed ruling until a few weeks before trial. CR V2, P.2336. None of the claimed evidence by MSW in its appeal addresses any of those deficiencies. As to the four factual matters asserted in MSW's brief, note the following:

As to the first, the assertion of Noons that he was entitled to financial information since MSW was half owner of the Landfill has no bearing on any legal obligation to disclose. The courts are consistent that a co-owner of property has no fiduciary duty of disclosure. *Glover* at 218 and *Donnan* at 717.

As to the second matter that Gulley-Hurst had somehow assumed an affirmative duty under the 2011 Operating Agreement to provide financial information, while MSW operated the Landfill under the Operating Agreement, it had an obligation to provide monthly financials to Gulley-Hurst. When Gulley-Hurst terminated that Agreement due to default and operated the Landfill, its operations were not in any way subject to the former Operating Agreement. CR V1,

P.1204-1227. While a letter dated August 28, 2013, set out arrangements that could have been made concerning the provision of financial information, MSW never showed any evidence that it complied with any of the conditions. CR V1 P1232-34. Claims by Noons do not create a legal obligation to provide information.

MSW's third matter pertains to Gulley-Hurst's discussing the possible sale of the Landfill and entering into a Confidentiality Agreement with Progressive Waste on October 15, 2015 (CR V2, P.1675). Those events occurred after the Deed had been delivered by MSW. None of that created a duty of disclosure to MSW prior to the September 24, 2015, deadline to close its purchase. In the same way, discussions with Progressive Waste prior the 2011 purchase by MSW and discussions in 2015 did not somehow create a duty of disclosure where no duty existed.

As to the fourth matter, the evidence was unrebutted that up until the last few months of 2015 the financial operation of the Landfill was difficult. The mere claim that bank statements showed "large sums of cash coming into the Landfill" does not in any way prove profitability, and the facts that conditions improved in the last few months of 2015 after the September 24, 2015, deadline for MSW to act are irrelevant. None of the claims create any duty of disclosure or provide a remedy to MSW for not exercising its right to purchase the Landfill for $13,500,000. MSW never showed it had the financial capability to do so.

Summary judgment denying MSW's claims of fraud was correct and should

be affirmed.

PRAYER

The undisputed evidence and the law entitle Gulley-Hurst, appellee and cross-appellant herein, to the relief granted it in the trial court. The trial court was absolutely correct in interpreting the law and applying it to the undisputed facts as to the seven (7) issues raised by MSW as appellant:

1. The trial court properly rendered judgment notwithstanding the verdict and disregarded the jury's award of $10.235 million to MSW;
2. The trial court did not err in refusing to submit MSW's jury question concerning lost profits;
3. The trial court did not err in determining that the MSA was not an option contract as a matter of law, and in refusing to submit MSW's jury questions on that issue;
4. The trial court properly granted summary judgment on MSW's Counts 1, 12 and 13;
5. The trial court properly rejected MSW's claim for rescission of the MSA;
6. The trial court properly granted summary judgment on MSW's Counts 2 through 5 and 6 through 11; and
7. The trial court properly granted summary judgment on MSW's fraud claims.

Based on the foregoing, Gulley-Hurst respectfully requests that the judgment

should be affirmed as to the seven (7) issues raised by MSW as appellant.

Respectfully submitted,

WOOD, BOYKIN & WOLTER
A Professional Corporation
615 N. Upper Broadway, Suite 1100
Corpus Christi, Texas 78401
(361) 888-9201
(361) 888-8353 (facsimile)

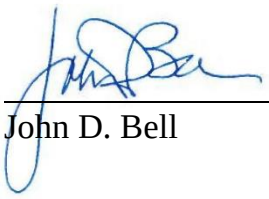
By: _____
John D. Bell
State Bar No. 02078900
jdbell@wbwpc.com

Douglas A. Allison
LAW OFFICES OF DOUGLAS A. ALLISON
403 North Tancahua Street
Corpus Christi, Texas 78401
(361) 888-6002
(361) 888-6651 (facsimile)
State Bar No. 01083500
doug@dallisonlaw.com

Douglas Laycock
Alice McKean Young Regents Chair in Law Emeritus
University of Texas Law School of Law
727 E. Dean Keeton St.
Austin, TX 78705
Telephone: 512-232-1224
State Bar No. 12065300
dlaycock@law.utexas.edu
Attorneys for Cross-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), counsel for Appellee certifies that they relied on a word count computer program in preparing this document, that the font size is 14pt, and that this Appellee's Brief complies with Tex. R. App. P. 9.4(i)(2)(B). Excluding the items noted in Tex. R. App. P. 9.4(i)(1), this Appellee's Brief contains 11,030 words according to the word count of Microsoft Word program from the Statement of Facts through the end of the Prayer.



John D. Bell

CERTIFICATE OF SERVICE

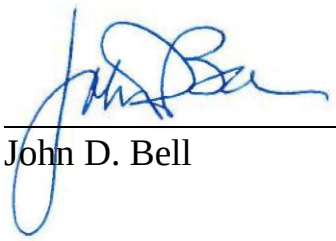
I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Appellate and Civil Procedure, on those named below, on this 16th day of December, 2020.

Via Electronic Filing System and by Direct Email

Patrick J. Carew
Kilpatrick Townsend & Stockton LLP
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201
pcarew@kilpatricktownsend.com

Audrey Mullert Vicknair
Law Office of Audrey Mullert Vicknair
802 N. Carancahua, Suite 2100
Corpus Christi, Texas 78401-0038
avicknair@vicknairlaw.com

Monica I. Bohuslav
The Marye Law Firm, P.C.
2619 Hibernia Street
Dallas, Texas 75204
mbohuslave@maryelaw.com



John D. Bell

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Veronica Salais on behalf of John Bell
Bar No. 02078900
veronica@wbwpc.com
Envelope ID: 49024255
Status as of 12/16/2020 5:39 PM CST

Associated Case Party: MSW Corpus Christi Landfill, Ltd.

Name	BarNumber	Email	TimestampSubmitted	Status
Patrick James Carew	24031919	pcarew@kilpatricktownsend.com	12/16/2020 4:45:41 PM	SENT
Audrey Vicknair	14650500	avicknair@vicknairlaw.com	12/16/2020 4:45:41 PM	SENT
Monica Bohuslav	24074250	mbohuslav@maryelaw.com	12/16/2020 4:45:41 PM	SENT

Associated Case Party: Gulley-Hurst, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
John David Bell	2078900	jdbell@wbwpc.com	12/16/2020 4:45:41 PM	SENT
Douglas A. Allison	1083500	doug@dallisonlaw.com	12/16/2020 4:45:41 PM	SENT